In the Supreme Court of the United States

No. 918. 41

OCTOBER TERM, 1942.

GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association,

Petitioner,

vs.

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE PACIFIC LINES OF SOUTHERN PACIFIC COMPANY, an unincorporated association, and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENT, GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE PACIFIC LINES OF SOUTHERN PACIFIC COMPANY, ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1. Conflict of decisions.

Respondent, General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines Southern Pacific Company, agrees that the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case, in that part of said decision under heading B,[1]

[1] All references herein to the decision of the Circuit Court of Appeals for the Ninth Circuit are confined to that portion of the decision contained under heading B (R. 815-826, 132 F. 2d 202-6).

is in conflict with the decision of identical issues by the Circuit Court of Appeals for the Fifth Circuit in the case of *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad v. Missouri-Kansas-Texas Railroad Company et al.*, 132 F. 2d 91, as to which petition for writ of certiorari (No. 796 this term) was filed in this Court on March 8, 1943.[1] But whereas in the *Missouri-Kansas-Texas* case there was also conflict with the decision of this Court in *Virginian R. Co. v. System Federation No. 40, etc.*, 300 U. S. 515, in the instant case there is no conflict between the decision of this Court in the *Virginian R. Co.* case and part B of the decision of the Circuit Court of Appeals for the Ninth Circuit. On the contrary, the decision of the Ninth Circuit is in accord with the decision in the *Virginian R. Co.* case.

2. Importance of questions presented.

This respondent agrees that the questions decided by the Circuit Court of Appeals for the Ninth Circuit are important questions of federal law. In No. 796, the petitioner General Committee similarly alleged the importance of the substantially identical questions there involved and gave reasons therefor (petition No. 796, pp. 8, 18-20).

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[1] In No. 796, the petitioner General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad alleged such conflict (petition pp. 8, 11).

3. The Circuit Court of Appeals did not err in holding that Sections 2, 3, 4 and 6 of Article 43 of the Firemen's agreement shall be limited in their application to conditions under which demoted engineers enter, remain in, and leave the firemen's craft, and that said sections are invalid in so far as they seek to prescribe conditions of re-entry into the engineers' craft or to regulate the mileage of engineers or the number of engineers to be assigned to the engineers' working lists.

In *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515, 548, this Court said that the Railway Labor Act "imposes the affirmative duty (upon the carrier) to treat only with the true representative, and hence the negative duty to treat with no other." The effect of the holding of the Circuit Court of Appeals in the instant case is to declare that the carrier must treat only with the respondent as the representative of the craft of locomotive engineers concerning rules governing that craft, and hence to declare that the carrier should not treat with the petitioner, which is the representative of the craft of locomotive firemen on the respondent carrier and is not, and never has been, the representative of the craft of locomotive engineers thereon, concerning rules governing the engineers' craft. Such holding does not in any wise interfere with the full measure of the rights of petitioner as the representative of the firemen's craft to make with the carrier rules governing the craft of locomotive firemen, and does not in any way interfere with the negotiating by the petitioner with the carrier of rules governing the return of demoted engineers to the working lists of locomotive firemen and the length of time or the conditions under which such demoted engineers shall remain on the working lists of locomotive firemen. But it is one thing for the craft representative of the firemen to prescribe with the carrier conditions under which demoted engineers may enter, remain in, and leave the craft of loco-

motive firemen, and it is quite another thing for the representative of the firemen's craft to prescribe with the carrier conditions under which demoted engineers, after leaving the firemen's craft, shall or may return to the working lists of locomotive engineers, or to prescribe the regulation of engineers' mileage or the number of engineers to be assigned to engineers' working lists. The decision of the Circuit Court of Appeals clearly recognized that distinction (R. 823, 132 F. 2d, 205).

The correctness of the construction which the Circuit Court of Appeals placed upon the Act becomes clear when it is borne in mind that the foundation of the statutory plan is collective bargaining and agreement by crafts or classes of employees and the carriers. There are and always have been two distinct crafts in engine service, one of locomotive engineers and the other of locomotive firemen. Each craft has, and for many years has had, its own craft representative, as petitioner agrees (petition p. 3). General Committees of Adjustment of the Brotherhood of Locomotive Engineers traditionally have represented the engineers' craft, and General Grievance Committees of the Brotherhood of Locomotive Firemen and Enginemen similarly have represented the firemen's craft. These representatives long have negotiated separate craft agreements with the carriers concerning the rates of pay, rules and working conditions of their respective crafts. There are separate agreements in the instant case (Ex. 1, R. 111, 326-465, Ex. 2, R. 111, 468-636). Jurisdictional disputes over rules and working conditions such as those involved here are not infrequent.[1] Plainly, it is necessary that a line of demarcation or cleavage between the jurisdictions of the various crafts must be recog-

[1] In No. 796, the *Missouri-Kansas-Texas R. Co.* case, for example, the Firemen's Committee negotiated rules respecting the calling of emergency engineers which were in conflict with the rules theretofore agreed to between the Engineers' Committee and the carrier on this subject (petition in No. 796, pp. 3, 4).

nized if the doctrine of exclusive craft representation is to be given its intended effect. The Circuit Court of Appeals, we submit, correctly found the line of demarcation applicable to the case at bar in holding that it is "at the point of imposing conditions of entry into the one craft or the other."[1] (R. 824, 132 F. 2d at 205.)

It is neither illogical, impractical, nor unrealistic, as asserted by petitioner (br. 17) to draw a definite line between the crafts or the jurisdiction of the craft representatives. The fact that, as the amount of traffic fluctuates, certain employees may at one time work as engineers and at another work as firemen, or that there is what petitioner calls a flow of workers between the two crafts, does not destroy or in any wise affect craft distinctions. All this so-called flow of workers amounts to is that some men work at different times in the two crafts. But, when a man works as a locomotive engineer he enters, or returns to, the craft of engineers and works under rules agreed upon between the engineers' craft representative and the carrier, and when he works as a fireman he enters or returns to the craft of firemen and works under rules and regulations agreed upon between the firemen's craft representative and the carrier. The flow of workers is a condition which relates to the individual, not the crafts. The Circuit Court of Appeals recognized that the "ebb and flow" of men between

[1] The Circuit Court of Appeals applied this line of demarcation to the Questions and Answers of Firemen's Article 37, Section 15, in decreeing that the Questions and Answers are valid only in so far as they relate to the rights of firemen as such, and that they are invalid in so far as they relate to the entry of firemen into the craft of engineers (R. 826, 132 F. 2d at 206). It also applied it to Article 43 of the Firemen's agreement by limiting the application of said article "to conditions under which demoted engineers enter, remain in, and leave the firemen's craft," and held that this article was invalid in so far as its provisions sought to prescribe conditions of re-entry into the engineers' craft or to regulate the mileage of engineers or the number of engineers to be assigned to the engineers' working lists (R. 823, 132 F. 2d at 205).

the two crafts did not affect the separateness of the crafts or serve as a basis for control by the one craft or the other (R. 824, 132 F. 2d at 205-6).

Reference to Section 3 of Article 43 of the Firemen's agreement (Ex. 2, R. 604) quoted on page 5 of the petition herein, will illustrate our position. This rule reads in part as follows:

> "Engineers taken off under this rule shall be *returned to service as engineers, etc.*"

If this rule were stated so as to express the full limit of petitioner's authority as representative of the firemen's craft, it should be stated substantially as follows:

> "Engineers taken off under this rule shall be required to *leave service as firemen*, etc."

The matter of when a man would return to service as engineer after leaving the firemen's working list would then properly be left for negotiation and agreement between this respondent as the exclusive craft representative and the respondent carrier. Such is the effect of the holding of the Circuit Court of Appeals.

Petitioner speculates as to what might happen to the supply of engineers if craft rules were drawn in accordance with the Circuit Court of Appeals' interpretation (br. 17, 18). Counsel's assumption of serious operating difficulties is mere conjecture. The carrier's expert witness was asked whether it would be practical to have engineers' mileage rules different from those of firemen. He did not say that such a situation would be impractical and answered only that it would be "more practical" to have the rules the same, explaining that the craft rules were different now in one instance wherein the engineers' agreement is applied in reducing engineers from the working lists and the firemen's agreement is applied in placing the demoted men on the firemen's lists (R. 179-80). Quite possibly, if the carrier would so agree, firemen would not

need to accept promotion. But firemen desire promotion, and it is not likely that the firemen's craft would ever adopt a rule denying the right to those of its members who had been promoted to return to firing when engineers' work was no longer available. It is a matter of self-interest of the firemen's craft to provide for such return (R. 186).

Petitioner states (br. 18) that the effort to draw the line between the crafts has the effect of overlooking the interests and rights of the employer. Significantly, the carrier, one of the appellees below, has filed no independent petition for review in this Court, nor has it joined with the petitioner here. Apparently it is not frantically alarmed about the alleged overlooking of its interests or rights. Petitioner's simulated concern should receive scant consideration. In any event, contrary to petitioner's assertion (br. 18), the Railway Labor Act, which requires the carrier to deal only with the representative chosen by the majority of the craft, does not countenance the making by a carrier of an agreement for a given craft with a representative other than the majority one, even if the carrier is not able to make an agreement satisfactory to itself with the majority representative.

There is no violation of that part of Section 1, Fifth, of the Railway Labor Act reading as follows:

> "* * * nor shall the jurisdiction or power of such employee organizations be regarded as in any way limited or defined by the provisions of this Act."

as contended by petitioner (br. 16, 17). Petitioner does not contend that there are not two separate crafts. But while seeking to maintain the exclusive right of the firemen's craft representative to control the demotion privilege governing demotion of engineers to work in the firemen's craft, it also seeks to overreach into the engineers' craft, and control the promotion privilege governing promotion of men to work in the engineers' craft. Since the

rules in question relate only to performance of work in one admittedly separate craft, there can be no violation of the portion of the statute quoted.

4. The Circuit Court of Appeals did not err in holding that the Questions and Answers of Article 37, Section 15, are valid only in so far as they relate to the rights of firemen as such under said section, and are invalid in so far as they relate to entry of a fireman into the craft of engineers.

The Questions and Answers (R. 9-10, 587, petition pp. 8-9) expressly purport to govern the calling and use of firemen to *perform service as emergency engineers*. Question (a) asks who should be called for such service when the engineers' extra list is exhausted and it becomes necessary to call a fireman. Question (b) asks whether the man selected and used under Question (a), or a senior demoted engineer holding assignment as fireman who becomes available after the former returns to the terminal or completes his day's work, should be used to perform such service.

Petitioner concedes (br. p. 20) that Question (a) relates to calling a fireman for service as engineer. Petitioner describes Question (b) as relating to the "status" of a senior demoted engineer holding assignment as a fireman who afterwards becomes available. This description is incomplete for, as just noted, this rule expressly provides for the *use* of the man designated thereby as *an emergency engineer*.

The calling and use of firemen to perform service as emergency engineers necessarily involves their entry into the engineers' craft. Since, as hereinbefore pointed out, the rules governing entry into the engineers' craft are under the Act to be determined exclusively by the representatives of the engineers' craft and the carrier—and, in fact, rules on this subject have been agreed upon by the

engineers' committee and the railroad (Ex. 10, R. 302-306) —it follows that the Questions and Answers, in so far as they relate to entry of firemen into the engineers' craft, are invalid. The declaration of the Circuit Court of Appeals was precisely to this effect.

At the same time, the declaration, in providing that the Questions and Answers are valid only in so far as they relate to the rights of firemen as such under Section 15, accords to the firemen's craft all that petitioner may properly claim. As in the case of the mileage rules contained in Article 43, *supra*, the sole permissible area of petitioner's right of contract is the regulation of the rules governing the service of firemen working as such. In directing that a designated man be called or used as an emergency engineer, the Questions and Answers are beyond and outside of this permissible area of regulation.

Petitioner contends (br. 20) that the Questions and Answers are proper because they are reasonably calculated to protect the craft of firemen and prevent the railroad from evading Section 15 or avoiding payment of guaranteed mileage. This argument is beside the point. Assuming, *arguendo*, that petitioner may properly contract for such wage guarantees or penalties, the means employed to enforce or implement such contract must lie within the scope of petitioner's authority as the representative of the firemen's craft. The provisions of the Questions and Answers specifying the employment or use of firemen as locomotive engineers are beyond that authority.

CONCLUSION.

We recognize the conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case and the decision of the Circuit Court of Appeals for the Fifth Circuit in the *Missouri-Kansas-Texas R. Co.* case in No. 796, and also the great importance of the ques-

tions decided in the two cases. But, while the decision of the Fifth Circuit in the *Missouri-Kansas-Texas* case requires review in order to correct the error of that court in its failure to follow the decision of this Court in the *Virginian R. Co.* case, in the instant case, since the decision of the Ninth Circuit accords with the *Virginian R. Co.* decision and there is no error to correct here, there is no impelling reason for granting the writ herein.

Respectfully submitted,

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